No. 81 6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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QUESTIONS PRESENTED

1. Does New York state violate the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution by denying law abiding minors between fourteen and eighteen, even when pregnant, any opportunity to demonstrate their capacity to marry if any one parent objects to the marriage, while affording to minors who have lied or otherwise circumvented state law to marry, a full judicial hearing on capacity to marry, even over the objection of all parents?

2. Should a subclass have been certified of out of wedlock children whose minor parents have been denied any opportunity to demonstrate their capacity to marry?

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No.

IN THE
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OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Petitioners Cristina Coe and Pedro Doe* respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on January 11, 1982.

* Maria Moe, Raoul and Ricardo Roe were also plaintiffs-appellants in the case below. They have decided not to appeal here. All other parties in the case below are listed in the above caption. All plaintiffs were granted the right to proceed pseudonymously by the district court.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Second Circuit filed January 11, 1982 upheld the constitutionality of New York's scheme which denies law abiding minors, even when pregnant, any opportunity to demonstrate their capacity to marry if one parent withholds consent (unreported, attached as Appendix A). In doing so the court affirmed the decision of the United States District Court for the Southern District filed August 18, 1981 (unreported, attached as Appendix B). The District Court in a decision filed June 29, 1981 had previously granted certification of a defendant and plaintiff class but had refused to include in the plaintiff class a subclass of out of wedlock children born to minors who were denied an opportunity to demonstrate their capacity to marry (unreported, attached as Appendix C). The District Court decisions were made after the Court of Appeals had reversed and remanded on the issue of abstention (Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980), attached as Appendix D).

JURISDICTION

The judgment and opinion for the Court of Appeals for the Second Circuit were filed on January 11, 1982. This petition is timely filed within ninety days of that date.

This court's juridsiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws.

New York Domestic Relations Law §7 (McKinney 1977) provides in relevant part:

> A marriage is void from the time its nully is declared by a court of competent jurisdiction if either party hereto:
>
> 1. Is under the age of legal consent ... provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage;

New York Domestic Relations Law §13 (McKinney 1977) provides in relevant part:

> It shall be necessary for all persons intended to be married in New York state to obtain a marriage license ....

New York Domestic Relations Law §15 (McKinney 1977) provides in relevant part:

> If ... the man is under eighteen years of age and is not under sixteen years of age, or ... the woman is under the age of eighteen and is not under fourteen years of age, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors ....

New York Domestic Relations Law §24 (McKinney 1977) provides in relevant part:

> A child ... born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage ... is the legitimate child of both natural parents ....

STATEMENT OF THE CASE

Cristina Coe, sixteen years of age, and Pedro Doe, seventeen years of age, are the parents of an infant, Daniel, born in August 1981. They live together in their own apartment and Pedro's salary supports the family.

After Cristina discovered she was pregnant she and Pedro informed her mother of their desire to marry. Mrs. Coe insisted that Cristina have an abortion and refused to consent

to the marriage. When Cristina refused to keep two appointments Mrs. Coe had made for Cristina at an abortion clinic, Mrs. Coe informed Cristina that she wanted nothing more to do with Cristina and that Mrs. Coe was leaving the country. From February 1981 to June 1981 Cristina did not see or hear from her mother. By happenstance, in June 1981, Cristina saw her mother on the street and her mother ignored Cristina and passed by.

Cristina and Pedro wanted to marry before their child was born so that the child would never have to bear the stigma of illegitimacy. They also wanted to marry to express their caring for each other, legitimate their relationship and raise their child in accord with their beliefs in a traditional family unit. Both of Pedro's parents consented to the proposed marriage.

Pedro and Cristina sought and received the assistance of a certified social worker in planning for their life together, their marriage and the birth of their child. They joined and participated in an extensive pre-natal and post-natal program to prepare them for childbirth and parenthood. Hospital delivery of their child was recommended by the nurse-midwife who worked with Cristina in this program. Because of her unmarried status Cristina was not eligible for coverage of her hospital delivery through any health insurance associated with Pedro's employment or Medicaid and she had great difficulty making appropriate arrangements. This created a health hazard for Cristina and her expected child and caused her great stress and anxiety.

In an attempt to accomplish their goal of marrying before their child was born, Cristina and Pedro made a motion to intervene as additional class representatives in the pending case of Moe v. Dinkins. The case was brought pursuant to 28 U.S.C. §1343(3), challenging the New York State scheme as violative of rights guaranteed by the United States Constitution. They also made a motion to decide the pending motions in the case or issue a preliminary injunction before July 26, 1981,

the projected due date of their child. On June 29, 1981 the district court certified a plaintiff and defendant class but denied certification of a subclass of children of minor parents. On August 18, 1981 the district court granted the motion for Cristina and Pedro's intervention, denied plaintiffs' motion for summary judgment and granted summary judgment in favor of defendants.

REASONS FOR GRANTING THE WRIT

The Court of Appeals ignored this Court's holdings on the rights of minors, out of wedlock children and parents and the basic concept of procedural due process. The perpetuation of such error not only adversely affects Cristina, Pedro, their child and other families like them in New York. It undermines the well established concept of procedural due process. Also, in conjunction with holdings of this Court, it conveys a message to the numerous minors in this country confronted with pregnancy. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). That message is that abortion is their only constitutionally protected option and that they have no protectable interest in the well being of their children if born. The alternative which is considered a basic civil right, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), "essential to the orderly pursuit of happiness by free men," Loving v. Virginia, 308 U.S. 1, 12 (1976), "the foundation of the family," Maynard v. Hill, 125 U.S. 190, 211 (1888), and the only socially recognized and legally sanctioned context for child rearing, see Zablocki v. Redhail, 434 U.S. 374, 386, 390 (1978), is foreclosed to them. They may not even have access to any forum where they could attempt to demonstrate their capacity for marriage.

New York State has recognized the general capacity of women between fourteen and eighteen and men between sixteen

and eighteen to marry. N.Y. Dom. Rel. Law §§7, 15 (McKinney 1977); Matturro v. Matturro, 111 N.Y.S.2d 533 (Sup. Ct., Westchester Co. 1952); Matturro v. Matturro, 281 A.D. 695, 117 N.Y.S.2d 523 (2d Dept. 1952); Anonymous v. Anonymous, 176 Misc. 850, 29 N.Y.S.2d 331 (Fam. Ct., N.Y. Co. 1941); Brown v. Brown, 51 Misc.2d 839, 274 N.Y.S.2d 484 (Fam. Ct., N.Y. Co. 1966). However, only those minors who lie or otherwise circumvent New York State law to marry are afforded a hearing to determine their individual capacity to marry. N.Y. Dom. Rel. Law §7 (McKinney 1977); Matturro v. Matturro, Anonymous v. Anonymous, Brown v. Brown. The fact of nonage and lack of parental consent does not make a marriage void. If the marriage is challenged a judicial hearing is held to consider all the facts and circumstances surrounding the marriage even if all parents of the minors object. The judicial standard applied is that "[t]he marital status should be upheld, when the underaged persons involved show willingness and capacity for enduring marital life and for the building of a family unit." Short v. Hotaling, 32 Misc.2d 933, 934, 225 N.Y.S.2d 53, 55 (Sup. Ct., Kings Co. 1962). Accord, Magee v. Nealson, 108 Misc. 396, 177 N.Y.S. 517 (Sup. Ct., Steuben Co. 1919); Allerton v. Allerton, 104 Misc. 627, 172 N.Y.S. 152 (Sup. Ct., Wayne Co. 1918).

In contrast, law abiding minors who seek to marry are denied any opportunity to demonstrate their capacity to marry if only one parent in four will not go to the clerk's office and give her prior written consent. N.Y. Dom. Rel. Law §15. Affirmative written consent is required from any parent regardless of the circumstances. A parent like Cristina's, who does not live with, support or care for her daughter and who has abdicated all parental responsibility can veto the marriage. If one parent is insane and incapable of reasoned consent, that parent's affirmative permission is still required. A court appointed guardian cannot give consent in the parent's stead.

Moe v. Dinkins, 635 F.2d 1045, 1048-49 (2d Cir. 1980). The minors may be themselves parents or expecting a child. The one parent may refuse consent for any arbitrary reason or no reason at all. Moe v. Dinkins, 635 F.2d 1045, 1048 (2d Cir. 1980); In re Powers, 96 Misc.2d 183, 408 N.Y.S.2d 761 (Fam. Ct. Yates Co. 1978); Berger v. Adornato, 76 Misc.2d 122, 350 N.Y.S.2d 520 (Sup. Ct. Onondaga Co. 1973). Where one parent withholds consent, the other parents, the minors and their children are given no opportunity to have their concerns and desires heard. Further, the children born to minors who are barred from an opportunity to demonstrate their capacity to marry are condemned by New York to the status of illegitimacy. N.Y. Dom. Rel. Law §24, subd. 1 (McKinney 1977).

This court has held that minors as well as adults are persons protected by the Constitution. Parham v. J.R., 442 U.S. 584 (1979); Bellotti v. Baird, 443 U.S. 622 (1979); Carey v. Population Services International, 431 U.S. 678 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Breed v. Jones, 421 U.S. 519 (1975); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1966); Brown v. Board of Education, 347 U.S. 483 (1954).

> Constitutional rights do not mature and come into being magically only when one attains the state defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood at 74.

Specifically minors have a constitutional right to procedural due process. Parham v. J.R., 442 U.S. 584 (1979); Goss v. Lopez, 419 U.S. 565 (1975). This court has made it clear that when there is any deprivation of a person's life, liberty or property, procedural due process requirements apply. Parham v. J.R., 442 U.S. 584 (1979); Goss v. Lopez, 419 U.S. 565

(1975); Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972). It is the nature of the interest at stake, not the weight, which determines whether due process applies. Consideration of the length and severity of a deprivation is relevant only when determining the appropriate form of the procedure required . Goss at 577; Board of Regents v. Roth, 408 U.S. 564 (1972).

The Court of Appeals ignored Cristina and Pedro's claim for procedural due process and applied instead an equal protection analysis, holding that a rational relationship test rather than strict scrutiny test was appropriate because "the right of minors to marry has not been viewed as a fundamental right deserving strict scrutiny" (Appendix A, p. 5). Whether Cristina and Pedro's interest in the well being of their child and the legality of their relationship is viewed as a fundamental interest has no bearing on their procedural due process claim. They had a liberty interest in preventing their child from being born illegitimate, raising him in a legally sanctioned family and legitimating their relationship through marriage. See Zablocki v. Redhail, 434 U.S. 384, 386 (1978). Therefore some process is due.* The Court of Appeals decision if allowed to

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* The Court of Appeals equal protection analysis was also erroneous. Under the New York scheme and the relief requested in the case, the classifications to be compared are not minors as versus adults but minors versus minors. Minors who lie or otherwise circumvent state law are allowed to marry and if challenged are afforded a full judicial hearing on their capacity to marry despite parental objection while law abiding minors are not. The plaintiffs in this case did not seek an absolute right to marry like that afforded adults. They requested only that they, like other minors, be afforded the opportunity to demonstrate their capacity to marry. Denying them this opportunity violates equal protection regardless of what standard is applied. It is irrational to afford a hearing to persons who lie and circumvent state law and not provide the same opportunity to persons who are honest and attempt to subject themselves to the law.

stand would mean that parents merely because of their age do not have a liberty interest in the well being of their children and that persons merely because of their age do not have a liberty interest in maintaining a family relationship in the only legally and societally recognized manner, through marriage. Thus, a minor's constitutionally protected privacy interest would extend only to the option of abortion. This court has recognized that it is a nationwide biological fact that women become pregnant before the age of majority and has held that minors have a constitutional right to choose abortion. Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). The Court of Appeals decision forecloses a pregnant minor's alternative to an abortion, marriage and the bearing of a legitimate child into a legally sanctioned family.

The time difference involved between these two alternatives is minimal. A woman desiring an abortion must obtain one within twenty-four weeks or about five and a half months. Roe v. Wade, 410 U.S. 113 (1973). A woman wishing to bear a legitimate child must marry within nine months. If a woman cannot marry before her child is born, she and her child are forever burdened with the stigma of illegitimate birth. The fact that a child may be legitimated by marriage several years after birth does not remove the stigma of birth out of wedlock, nor does it remove the social, legal and economic liabilities that the child and his parents must suffer during those intervening years.

This court has recognized that illegitimate children are a disfavored class in our society, "hapless children" forced to suffer "societal approbation," Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 176 (1972), and innocent pawns to the stigma of bastardy. Zablocki v. Redhail, 434 U.S. 374, 386 (1978). Illegitimacy also handicaps their legal position in the world. For example, illegitimates are only legally entitled

to a "fair and reasonable sum" from their fathers for their support and only after a filiation proceeding and an order of support is issued. N.Y. Dom. Rel. Law §33, subd. 5 (McKinney 1977), N.Y. Fam. Ct. Act §545 (McKinney 1975); In re Commissioner of Social Services, 98 Misc.2d 450, 414 N.Y.S.2d 76 (Fam. Ct., N.Y. Co. 1978); Ellen N. v. Stuart K., 88 Misc.2d 280, 387 N.Y.S.2d 367 (Fam. Ct., Onondaga Co. 1976). Legitimate children are entitled to support in accordance with the "means" of the father. N.Y. Fam. Ct. Act §413 (McKinney Supp. 1980-1981). And if a minor father died intestate before he was able to marry, his illegitimate child would not inherit from him. N.Y. Est., Powers & Trusts Law §4-1.2 (McKinney 1981); Lalli v. Lalli, 439 U.S. 259 (1978).

Unwed mothers must suffer the legal status of "concubine," see Labine v. Vincent, 401 U.S. 532, 538 (1971) and are subjected to "society's condemnation," Parham v. Hughes, 441 U.S. 347, 351-52 (1979), and the "difficulties and continuing stigma of unwed motherhood," Roe v. Wade, 410 U.S. 113, 153, each and every day they are prevented from marrying the fathers of their infants. See Trimble v. Gordon, 430 U.S. 762, 768-70 and n.13 (1977).

While unwed mothers bear the responsibilities of wife and mother, they are denied all attendant rights that assist the fullfillment of these responsibilities. They may not collect Workmen's Compensation, N.Y. Work. Comp. Law §15 (McKinney 1965 and Supp. 1981-1982); or Social Security benefits, 42 U.S.C. §402 (1976); and they possess no intestate succession rights, N.Y. Est., Powers & Trust Law §4-1.1 (McKinney 1981). Moe v. Dinkins, 635 F.2d at 1047 n.5. They have no enforceable right to financial support from the fathers of their children. See Ellen N. v. Stuart K., 88 Misc.2d 280, 387 N.Y.S.2d 367 (Fam. Ct., Onondaga Co. 1976). They cannot qualify for employment related benefits, such as health insurance as the respective spouse of their childrens fathers. If the fathers die or become

disabled, unwed mothers are left totally responsible for themselves and their helpless infants without the economic protection afforded wives and inwedlock mothers. See N.Y. Dom. Rel. Law §33, subd. 5 (McKinney 1977).

Similarly, unwed minor fathers suffer the social condemnation of unwed fatherhood, even when they sought to marry their respective mates and legitimate their children. This court held that it was constitutional to discriminate against an out of wedlock father on the basis of his irresponsibility in failing to legitimate his child. Parham v. Hughes, 441 U.S. 437 (1979). Thus a minor father like Pedro is condemned and discriminated against by a state because his child was born out of wedlock. Yet at the same time, the State denies him any opportunity to demonstrate his capactiy for the only act which would have prevented the illegitimate birth, marriage.

Further, unmarried status jeopardizes the minors' ability to support their children. All parents must adequately support, house, clothe and attend to the medical needs of their children. If they fail to do so they may be subjected to neglect proceedings and deemed unfit parents warranting the removal of their children from their custody. N.Y. Fam. Ct. Act §1011-1015 (McKinney 1975 and Supp. 1980-1981). See generally Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821 (1976); In re Suzanne Y., 92 Misc.2d 652, 401 N.Y.S.2d 383 (Fam. Ct., N.Y. Co. 1977). Yet unmarried status frustrates efforts to meet these obligations. If married, minor parents like Cristina and Pedro could enter a lease or buy real property, N.Y. Gen. Obl. Law §3-101, subd. 3 (McKinney 1978), undertake obligations for hospital, medical, and surgical treatment and care, N.Y. Gen. Obl. Law §3-102, subd. 1 (McKinney 1978), or consent to personal medical, dental, health and hospital services, N.Y. Publ. Health Law §2504, subd. 1 (McKinney 1977). Unwed minor parents, unlike married minors, do not have an exclusive claim over any of their

earnings and services. Any of their parents can lay claim over their wages by filing written notice with their employers. N.Y. Gen. Obl. Law §3-109 (McKinney 1978). Cochran v. Cochran, 196 N.Y. 86, 89 N.E. 470 (1909); Armstead v. Dumpson, 79 Misc.2d 174, 359 N.Y.S.2d 730 (Sup. Ct., Queens Co. 1974); In re Palumbo, 172 Misc. 55, 14 N.Y.S.2d 329 (Dom. Rel. Ct., N.Y. Co. 1939).

Thus, maintenance of the Court of Appeals decision gives the following message to the numerous minors in this country who are confronted with pregnancy: you may have an abortion, you may bring a child into life to suffer the myriad liabilitites of illegitimacy and you will be forced, even when you are eager to marry and legitimate your child, to suffer the social, legal and practical disabilities of unmarried parenthood, but you may not have the opportunity to demonstrate your capacity for the mature and socially responsible option of taking responsibility for the consequences of your actions, marrying and preventing the attachment of the stigma of illegitimacy to your child and your relationship.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Judgment and Opinion of the United States Court of Appeals for the Second Circuit, filed January 11, 1982

APPENDIX B

Opinion of the United States District Court for the Southern District, filed August 18, 1981 (Summary Judgment)

APPENDIX C

Opinion of the United States District Court for the Southern District, filed June 29, 1981 (Class Certification)

APPENDIX D

Opinion of the United States Court of Appeals for the Second Circuit, filed December 9, 1980 (Abstention)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of January one thousand nine hundred and eighty-two

Present:

HON. LEONARD P. MOORE,

HON. IRVING R. KAUFMAN,

HON. VAN GRAAFEILAND,

Circuit Judges,

U.S. DISTRICT COURT FILED FEB 5 1982 S.D. OF N.Y.

UNITED STATES COURT OF APPEALS FILED JAN 11 1982 A. DANIEL FUSARO, CLERK SECOND CIRCUIT

81-7588
81-7636

MARIE MOE, RAOUL ROE, RICHARD ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

and

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Intervenors-Appellants-Cross-Appellees,

v

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants,

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Defendants-Appellees-Cross-Appellants.

#81-7588
81-7636

SDNY #

80 Civ 1577 (CBM)

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District Court of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments and orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk

JUDGMENT ENTERED 2/5/82 by Arthur Heller, Deputy Clerk

Raymond F. Burghardt
CLERK

A TRUE COPY
A. DANIEL FUSARO, CLERK
By Francis X. Gindhart

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 520, 630—August Term, 1981

(Argued: January 8, 1982 Decided: January 11, 1982)

Docket Nos. 81-7588, 81-7636

MARIE MOE, RAOUL ROE, RICHARD ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

—and—

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Plaintiffs-Intervenors-Appellants-Cross-Appellees,

—against—

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State,

Defendants,

—and—

DAVID AXELROD, individually and as New York State Commissioner of Health,

Defendants-Appellees-Cross-Appellants.

Before:

MOORE, KAUFMAN and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from a judgment and orders entered in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, (1) granting defendants' motion for summary judgment and dismissing plaintiffs' complaint, and (2) denying plaintiffs' motion for certification of a subclass of out-of-wedlock children whose parents are barred from marriage pursuant to New York Domestic Relations Law § 15.

Cross-appeal from the same judgment and orders (1) denying defendants' motion to dismiss with a request for disclosure of the identities of the plaintiffs, (2) granting plaintiffs' motion to certify plaintiff classes, and (3) granting leave to Christina Coe and Pedro Doe to intervene and proceed without disclosing their identities.

Affirmed.

JANET M. CALVO, New York, New York (Amy L. Beckett, Marjorie E. McAboy, Peter A. Triandifilou, Washington Square Legal Services, Inc., New York, N.Y., *of Counsel*), *for Plaintiffs-Appellants-Cross-Appellees* and *Plaintiffs-Intervenors-Appellants-Cross-Appellees*,

ROBERT J. SCHACK, Assistant Attorney General of the State of New York, New York, New York, (Robert Abrams, Attorney General of the State of New York, George D. Zuckerman, Assistant Solicitor General of the State of New York, New York, New York *of Counsel*), *for Defendants-Appellees-Cross-Appellants*.

Per Curiam:

Marie Moe, Raoul Roe, Richard Roe, Christina Coe and Pedro Doe (hereinafter "Moe"), on behalf of themselves and others similarly situated, appeal (1) from an order and

judgment entered by Judge Motley granting defendants' motion for summary judgment and dismissing Moe's complaint, and (2) from her order denying Moe's motion for certification of a subclass of out-of-wedlock children whose parents are barred from marriage pursuant to New York Domestic Relations Law § 15. David Axelrod, individually and as New York State Commissioner of Health, cross-appeals (1) from Judge Motley's order denying his motion to dismiss with a request for disclosure of the identities of the plaintiffs, (2) from the trial court's order granting Moe's motion to certify plaintiff classes, and (3) from the order and judgment granting leave to Christina Coe and Pedro Doe to intervene and proceed without disclosing their identities. We affirm in all respects, substantially for the reasons stated in Judge Motley's thorough and well-reasoned opinion. In view of the novel and significant questions raised by Moe's claim that the New York parental consent requirements for the marriage of minors are unconstitutional, we add the following.

Moe asserts a deprivation of liberty guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution as a result of the operation of New York Domestic Relations Law § 15 (14 McKinney, 1977). New York law requires that all male applicants for a marriage license between ages 16 and 18 and all female applicants between ages 14 and 18 must obtain the consent of their parents, and that a female between ages 14 and 16 must obtain judicial approval as well as parental consent. *Id.*, §§ 15.2, 15.3. Intimate activities concerning marriage and family relations have long been accorded stringent judicial protection on the ground that such activities implicate rights of privacy protected by the Due Process Clause of the United States Constitution. *See, e.g., Zablocki* v. *Redhail*, 434 U.S. 374 (1978); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). While courts have subjected certain restrictions on the right to marry to heightened scrutiny, *see, e.g., Zablocki* v. *Redhail*, *supra* (statute provided that failure to comply with child

support orders precluded a parent from marrying without court permission); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (antimiscegenation statute unconstitutionally infringed right to marry), the right of minors to marry has not been viewed as a fundamental right deserving strict scrutiny. Accordingly, Judge Motley was correct in testing the constitutionality of New York Domestic Relations Law § 15 by determining whether there exists a rational relation between the means chosen by the New York legislature and legitimate state interests in adopting and enforcing the restriction.[1] In light of New York's important interest in promoting the welfare of children by preventing unstable marriages among those lacking the capacity to act in their own best interests, *see Addington* v. *Texas*, 441 U.S. 418, 426 (1979), we agree with Judge Motley that the New York statutory scheme passes constitutional muster.

Accordingly, we affirm in all respects.

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[1] In a case involving minors who desire to marry as a means of granting legitimacy to their child, the New York statutory scheme provides relief. New York Domestic Relations Law § 24(1) states that the subsequent marriage of the parents confers legitimacy upon a child born prior to the marriage. Furthermore, the effect of out-of-wedlock birth may be erased by adoption of the child pursuant to New York Domestic Relations Law § 117(1). Accordingly, the New York statute provides at least two avenues by which minor parents of a child born prior to the time at which they can enter a valid legal marriage can ensure that the child will not suffer from acts or omissions of the parents.

It should also be noted that Section 15's requirement of parental consent applies to all minors within the statutory age categories, not just those with illegitimate children. As a result, the New York statutory scheme cannot be viewed as an attempt to punish minors with illegitimate children.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARIA MOE, RAOUL ROE, and RICHARD ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

80 CIV. 1577 (CBM)

DAVID DINKINS, individually, and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually, and as New York State Commissioner of Health,

Defendants.

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CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION

Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe seek a judgment declaring unconstitutional, and enjoining the enforcement of, the parental consent requirement of New York Domestic Relations Law §§ 15.2 and 15.3 (Section 15). Section 15.2 provides that all male applicants for a marriage license between ages 16 and 18 and all female applicants between ages 14 and 18 must obtain "written consent to the marriage from both parents of the minor or minors or such as shall then be living. . . ." Section 15.3 requires that a woman between ages 14 and 16 obtain judicial approval of the marriage, as well as the parental consent required by Section 15.2.

This action is now before the court on plaintiffs' motion for summary judgment declaring Section 15 unconstitutional and enjoining its enforcement. Plaintiffs' motion came on for hearing after this case had been remanded to this court by the Court of Appeals for this Circuit. The Court of Appeals reversed this court's initial determination that it should abstain from deciding the constitutionality Section 15 until the statute had been construed by the New York State courts. Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980).

Prior to the hearing on plaintiffs' motion for summary judgment, this court filed a memorandum opinion and order which granted in part plaintiffs' motion to certify a plaintiff

and a defendant class. Moe v. Dinkins, No. 80 Civ. 1577 (S.D.N.Y. June 29, 1981). The plaintiff class consists of:

> persons who wish to marry in New York State but cannot obtain a marriage license or judicial approval to obtain a marriage license because they, or the persons whom they seek to marry, lack parental consent as required by New York Dom. Rel Law §§ 15.2 and 15.3.

The plaintiff class is represented by Maria Moe and Raoul Roe. The defendant class consists of:

> all town and city clerks in New York State. All such clerks are required by New York State law to enforce the parental consent provisions of New York Dom. Rel. Law §§ 15.2 and 15.3.

The defendant class is represented by David Dinkins, City Clerk of New York City. David Axelrod, New York State Commissioner of Health, is also a defendant in this action.

Plaintiff Raoul Roe was eighteen years old when this action was commenced. Plaintiff Maria Moe was fifteen years old. Plaintiff Ricardo Roe is their one year old son who was born out of wedlock. Plaintiffs live together as an independent family unit. In late November, 1978, Maria became pregnant by Raoul and in April, 1979, they moved into an apartment together. Maria requested consent from her mother, a widow, to marry Raoul, but Mrs. Moe refused, allegedly

because she wishes to continue receiving welfare benefits for Maria. Maria and Raoul continue to be prevented from marrying because of Mrs. Moe's failure to give consent to the marriage as required by Section 15. Maria and Raoul allege that they wish to marry in order to cement their family unit and to remove the stigma of illegitimacy from their son, Ricardo.

In addition, Cristina Coe and Pedro Doe have moved to intervene as plaintiffs and additional class representatives in this action, pursuant to Fed. R. Civ. P. 24(b)(2), and for an order allowing them to proceed with this action under pseudonyms and without appointment of a guardian ad litem.

For the reasons discussed below, the motion for intervention is granted. Plaintiffs' motion for summary judgment declaring Section 15 unconstitutional is denied. This court holds that the parental consent requirement of Section 15 does not violate plaintiffs' constitutional rights.

Intervention

Proposed plaintiff-intervenor Cristina Coe is fifteen years old. Proposed plaintiff-intervenor Pedro Doe is seventeen years old. Cristina is eight months pregnant with Pedro's child. Cristina and Pedro reside in the home of Pedro's father and step-mother. In January 1981, when Cristina discovered she was pregnant, she and Pedro informed Cristina's mother of their desire to have their child and to marry. Mrs. Coe refused to give Cristina her consent to marry and arranged for Cristina to have an abortion. Cristina refused to keep the appointments her mother made for her at the abortion clinic. Consequently, Mrs. Coe told Cristina she wanted to have nothing more to do with her and that she was leaving the country to live in the Dominican Republic.

Cristina and Pedro wish to marry to express their commitment to and caring for each other, to legitimate their relationship, and to raise their child in accord with their beliefs in a traditional family setting sanctioned by law. They wish to marry before their child is born so that he or she will never have the stigma of illegitimacy attached to his or her life. However, Cristina and Pedro are precluded from petitioning for judicial approval to obtain

a marriage license by operation of Section 15 because Mrs. Coe, Christina's custodial parent, refuses to consent to the marriage.

Rule 24(b)(2) of the Federal Rules of Civil Procedure allows permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common. . . ." The rule further provides that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

The claims of Cristina and Pedro present the same legal issue presented by the present plaintiffs — whether the parental consent requirement of Section 15 is constitutional. Like plaintiffs Maria Moe and Raoul Roe, Cristina and Pedro wish to marry in order to cement their family unit and raise their child without the stigma of illegitimacy. Like Maria and Raoul, Cristina and Pedro are prevented from marrying by the parental veto imposed by Section 15. Intervention will not result in any delay or prejudice to the rights of the original parties or to the orderly process of this court.

In addition, plaintiffs argue that the intervention of Pedro and Cristina will present the court with a more complete picture of the impact of Section 15's parental consent requirement and will add to the representativeness of the named class members. Section 15 requires that Maria, who is now sixteen, must have parental consent to obtain a marriage license. Section 15 requires

that Cristina must obtain judicial approval to marry, but precludes her from petitioning for judicial approval unless her parent has consented. While Maria has already borne a child, Cristina is now expecting a baby and is thus in a position to totally avoid the stigma of illegitimacy for her child.

Defendants object to the intervention of Cristina and Pedro on two grounds. First, defendants contend that Cristina and Pedro do not belong in the plaintiff class because New York law provides them with a means to obtain a marriage license without Cristina's mother's consent. Second, defendants argue that plaintiffs' motion for intervention should be denied because Cristina and Pedro have failed to reveal their true identities to defendants. The court finds both objections to be without merit.

Defendants state that under the New York Social Services Law a child less than eighteen years old may be declared abandoned by his or her parent. In that case, defendants contend, the Surrogate may grant letters of guardianship for the purpose of consenting to the teenager's marriage if marriage would be in the teenager's best interests. Defendants' contention is contrary to the ruling of the Court of Appeals in Moe v. Dinkins, supra, 635 F.2d at 1049, that in New York "the consent of a court-appointed guardian cannot bypass the statutory requirement of parental consent, regardless of the unfairness created by a refusal to grant permission." In that decision, the Court of Appeals rejected each of the alternative constructions of Section 15 posed by defendants which might allow an exception to the parental consent requirement.

Cristina's and Pedro's failure to reveal to defendants their true identies does not bar their intervention in this action. It is common for plaintiffs, both minors and those over the age of majority, to be permitted to proceed under a pseudonym where the case concerns matters of a highly sensitive and personal nature such as marriage and illegitimacy. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973) (abortion); Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y. 1972) (identification of putative fathers of illegitimate children); Child v. Beame, 412 F. Supp. 593 (S.D.N.Y. 1976) (minors' suit against foster care agencies).

Defendants claim that the secrecy surrounding Cristina and Pedro precludes them from verifying the standing of Christina and Pedro to challenge the constitutionality of Section 15. However, standing depends on what the complaint alleges. H.L. v. Matheson, 101 S. Ct. --, ___ (1981) (Powell, J., concurring); Warth v. Seldin, 422 U.S. 490, 498, 501 (1975). The proposed intervenor complaint filed by Cristina and Pedro alleges sufficient facts to demonstrate that they have the personal stake in the outcome of the controversy needed to confer standing. See Warth v. Seldin, supra, 422 U.S. at 498. In addition, both proposed intervenors have submitted sealed affidavits, signed in their true names, which attest to the accuracy of the allegations of the complaint. Plaintiffs' attorney has also filed an affidavit which states that Cristina and Pedro are real people who she has interviewed. Plaintiffs' attorney's signature on the intervenor

complaint further warrants that, to the best of her knowledge, the allegations are true. See Fed. R. Civ. P. 11.

For these reasons, the court holds that Cristina Coe and Pedro Doe may intervene in this action and may proceed under pseudonyms. Their request to proceed without the appointment of a guardian ad litem is also granted since their interests in the litigation are adequately protected by representation by competent counsel. See Baird v. Bellotti, 393 F. Supp. 847, 850 n.5 (D. Mass 1975), vacated on other grounds, 428 U.S. 132 (1976).

Since the facts which the defendants dispute are not material to the constitutional question presented or to the relief requested by plaintiffs, the court finds that summary judgment is appropriate. Plaintiffs do not seek an order mandating their marriage. They seek only a determination that the parental consent requirement is unconstitutional so that they may present to the appropriate official the facts relevant to a determination of whether a marriage license should issue. Accordingly, the court now proceeds to consider the merits of plaintiffs' challenge to Section 15.

The Merits

Plaintiffs contend that Section 15 of the New York Domestic Relations Law, [1] requiring parental consent for the marriage of minors between the ages of fourteen and eighteen, deprives them of the liberty which is guaranteed to them by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. [2]

A review of Supreme Court decisions defining liberties guaranteed by the Fourteenth Amendment reveals that activities relating to child-rearing and education of children, Pierce v. Society of Sisters, 268 U.S. 510 (1925), procreation, Skinner v. Oklahoma, 316 U.S. 535 (1942), abortion, Roe v. Wade, 410 U.S. 113 (1973), family relations, Moore v. City of East Cleveland, 431 U.S. 494 (1977), contraception, Carey v. Population Services International, 431 U.S. 678 (1977), and, most recently, marriage, Zablocki v. Redhail, 434 U.S. 374 (1978), are constitutionally protected rights of individual privacy embodied within the concept of liberty which the Due Process Clause of the Fourteenth Amendment was designed to protect.

However, neither Zablocki nor its predecessors, Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965), arose in the context of state regulation of marriages of minors. In that respect, this is a case of first impression.

While it is true that a child, because of his minority, is not beyond the protection of the Constitution, In re Gault, 387 U.S. 1 (1967), the Court has recognized the State's power to make adjustments in the constitutional rights of minors. Ginsberg v. New York, 390 U.S. 629 (1968) (criminal statute prohibiting the sale of obscene material to minors whether or not obscene to adults upheld despite First Amendment challenge); Prince v. Massachusetts, 321 U.S. 158 (1944) (child labor law prohibiting minors from selling merchandise on the streets upheld despite Jehovah Witness' challenge based on religious freedom).

"The power of the State to control the conduct of children reaches beyond the scope of authority over adults." Id. at 168. This power to adjust minors' constitutional rights flows from the State's concern with the unique position of minors. In Bellotti v. Baird, 443 U.S. 622 (1979), the Court noted "three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed and mature manner; and the importance of the parental role in child-rearing." Id. at 634.

Likewise, marriage occupies a unique position under the law. It has been the subject of extensive regulation and control, within constitutional limits, in its inception and termination and has "long been regarded as a virtually exclusive province of the State." Sosna v. Iowa, 419 U.S. 393, 404 (1975).

While it is evident that the New York law before this court directly abridges the right of minors to marry, in the absence of parental consent, the question is whether the State interests that support the abridgement can overcome the substantive protection of the Constitution. The unique position of minors and marriage under the law leads this court to conclude that Section 15 should not be subjected to strict scrutiny, the test which the Supreme Court has ruled must be applied whenever a state statute burdens the exercise of a fundamental liberty protected by the Constitution. Applying strict scrutiny would require determination of whether there was a compelling state interest and

whether the statute had been closely tailored to achieve that state interest. See, e.g., Carey v. Population Services International, 431 U.S. 678 (1977). The compelling state purpose necessitated by application of the strict scrutiny test "would cast doubt on a network of restrictions that the States have fashioned to govern marriage and divorce." Zablocki v. Redhail, 434 U.S. at 399 (Powell, J., concurring). It is this court's view that Section 15 should be looked at solely to determine whether there exists a rational relation between the means chosen by the New York legislature and the legitimate state interests advanced by the State. Cf. Ginsberg v. New York, 390 U.S. at 629 (rationality test employed in area of protected freedom). Section 15 clearly meets this test.

The State interests advanced to justify the parental consent requirement of Section 15 include the protection of minors from immature decision-making and preventing unstable marriages. The State possesses paternalistic power to protect and promote the welfare of children who lack the capacity to act in their own best interest. See Addington v. Texas, 441 U.S. 418, 426 (1979). The State interests in mature decision-making and in preventing unstable marriages are legitimate under its parens patriae power.

An age attainment requirement for marriage is established in every American jurisdiction. The requirement of parental consent ensures that at least one mature person will participate in the decision of a minor to marry. That the State

has provided for such consent in Section 15 is rationally related to the State's legitimate interest in light of the fact that minors often lack the "experience, perspective and judgment" necessary to make "important, affirmative choices with potentially serious consequences." Bellotti v. Baird, supra, 443 U.S. at 635-36.

Yet, plaintiffs fault the parental consent requirement of Section 15 as possibly arbitrary, suggesting that courts, as non-interested third parties, are in a better position to judge whether a minor is prepared for the responsibilities that attach to marriage. Although the possibility for parents to act in other than the best interest of their child exists, the law presumes that the parents "possess what the child lacks in maturity" and that "the natural bonds of affection lead parents to act in the best interest of their children." Parham v. J. R., 442 U.S. 584, 610 (1979) (procedure for voluntary commitment of children under eighteen to state hospitals by their parents held constitutional). "That the governmental power should supercede parental authority in all cases because some parents" may act in other than the best interest of their children is "repugnant to the American tradition." Id. at 602-03. See also Wisconsin v. Yoder, 406 U.S. 205 (1972) (state compelled attendance in formal high school to age sixteen unreasonably interferes with interest of Amish parents in providing their children with vocational education under parental guidance); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state compelled attendance in public school

from age eight to sixteen unreasonably interferes with the interest of parents in directing the rearing of their offspring); Meyer v. Nebraska, 262 U.S. 390 (1923) (statute prohibiting languages other than English from being taught to grade school children unreasonably interferes with the power of parents to control the education of their own children).

Plaintiffs also contend that Section 15 denied them the opportunity to make an individualized showing of maturity and denies them the only means by which they can legitimize their children and live in the traditional family unit sanctioned by law. On the other hand, New York's Section 15 merely delays plaintiffs' access to the institution of marriage. Cf. Sosna v. Iowa, 419 U.S. at 406 (durational residency requirement of one year for divorce proceedings held constitutional). Moreover, the prohibition does not bar minors whose parents consent to their child's marriage. Assuming arguendo that the illegitimacy of plaintiff Moe's child and plaintiff Coe's yet unborn child is a harm, it is not a harm inflicted by Section 15. It is merely an incidental consequence of the lawful exercise of State power. The illegitimacy of plaintiffs' children, like the denial of marriage without parental consent, is a temporary situation at worst. A subsequent marriage of the parents legitimatizes the child, thereby erasing the mark of illegitimacy. Estate of Elson, 94 Misc. 2d 983, 405 N.Y.S.2d 984 (1978). The rights or benefits flowi

from the marriage of minors are only temporarily suspended by Section 15. Any alleged harm to these rights and benefits is not inflicted by Section 15, but is simply an incidental consequence of the valid exercise of State power.

The fact that the State has elected to use a simple criterion, age, to determine probable maturity in the absence of parental consent, instead of requiring proof of maturity on a case by case basis, is reasonable, even if the rule produces seemingly arbitrary results in individual cases. "Simply because the decision of a parent is not agreeable to a child or because there is a [possible stigmatization of the child] does not automatically transfer power to make the decision from parents to some other agency or officer of the state." Parham v. J. R., 442 U.S. at 603.

Plaintiffs' reliance on the abortion and contraception cases is misplaced. See Bellotti v. Baird, 443 U.S. 662 (1979) (state may not impose a blanket prohibition requiring parental or judicial consent as a condition for abortion of an unmarried minor); Carey v. Population Services International, 421 U.S. 678 (1977) (state may not impose a blanket prohibition on right of minors to obtain contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state may not impose a blanket prohibition requiring consent of parent as a condition for abortion of an unmarried minor during the first twelve weeks of pregnancy). These cases can be distinguished from the instant case in that

> a pregnant minor's options are much different than those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of maturity is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for a later marriage should they continue to desire it.

Bellotti v. Baird, supra, 443 U.S. at 642 (emphasis added). Giving birth to an unwanted child involves an irretrievable change in position for a minor as well as for an adult, whereas the temporary denial of the right to marry does not. Plaintiffs are not irretrievably foreclosed from marrying. The gravamen of the complaint, in the instant case, is not total deprivation but only delay.

This court concludes that Section 15's requirement of parental consent is rationally related to the State's legitimate interests in mature decision-making with respect to marriage by minors and preventing unstable marriages. It is also rationally related to the State's legitimate interest in supporting the fundamental privacy right of a parent to act in what the parent perceives to be the best interest of the child free from state court scrutiny. Section 15, therefore, does not offend the constitutional rights of minors but represents a constitutionally

valid exercise of state power.

Accordingly, plaintiffs' motion for summary judgment in their favor is denied and summary judgment is entered in favor of defendants.

Dated: New York, New York
August 17, 1981

Constance Baker Motley
CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. The pertinent parts of Section 15 are as follows:

> (2) If it shall appear upon an application of the applicant as provided in this section or upon information required by the clerk that the man is under eighteen years of age and is not under sixteen years of age, or that the woman is under the age of eighteen and not under fourteen years of age, then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor or minors or such as shall then be living, or if the parents of both are dead, then the written consent of the guardians of such minor or minors. If one of the parents has been missing and has not been seen or heard from for a period of one year preceding the time of the application for the license, although diligent inquiry has been made to learn the whereabouts of such parent, the town or city clerk may issue a license to such minor upon the sworn statement and consent of the other parent. If the marriage of the parents of such a minor has been dissolved by decree of divorce or annulment, the consent of the parent to whom the court which granted the decree has awarded custody of such minor shall be sufficient. If there is no parent or guardian of the minor or minors living to their knowledge then the town or city clerk shall require the written consent for the marriage of the person under whose care and government the minor or minors may be before a license shall be issued. If a parent of such minor has been adjudicated an incompetent, the town or city clerk may issue a license to such minor upon the production of a certified copy of such judgment so determining and upon the written consent of the other parent.

N.Y. Dom. Rel. Law § 15 (14 McKinney).

FOOTNOTES, cont'd

2. There is no legislative history on Section 15 as amended in 1907 to include the licensing and parental consent requirement. New York State's Governor's Bill Jackets from 1906 to 1921 were destroyed in a fire. There is nothing in the New York Senate or Assembly Journals or Documents regarding the parental consent requirement. The New York Times mentions, albeit briefly, that Senator Wood, the sponsor of the bill, stated that "[t]his bill will correct many evils. I think that ther would be fewer runaway couples," New York Times, June 5, 1907, at 2, col. 2, and "enforcement of the law will prevent runaway marriages while the contracting parties are immature." New York Times, December 31, 1907, at 6, col. 3.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MARIA MOE, RAOUL ROE, and RICARDO ROE, an infant, by his father RAOUL ROE, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

80 CIV. 1577 (CBM)

DAVID DINKINS, individually, and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually, and as New York State Commissioner of Health,

Defendants.

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CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION

Plaintiffs Maria Moe, Raoul Roe and Ricardo Roe filed this class action on March 19, 1980, pursuant to 42 U.S.C. § 1983, for a judgment declaring unconstitutional, and enjoining the enforcement of, the parental consent requirements of New York Domestic Relations Law §§ 15.2 and 15.3 (section 15). New York law forbids marriage without a license. New York Dom. Rel. Law § 13. Section 15 provides that all male applicants for a marriage license between ages 16 and 18 and female applicants between ages 14 and 18 must obtain "written consent to the marriage from both parents of the minor or minors or such as shall then be living. . . ."

Plaintiffs claim that the challenged statute burdens the right to marry of minors and their prospective spouses and prevents them from establishing legitimate parent-child relationships through marriage, in violation of their rights under the first, fifth, ninth and fourteenth amendments to the United States Constitution.

Plaintiff Raoul Roe was eighteen years old when this action was commenced. Plaintiff Maria Moe was fifteen years old. Plaintiff Ricardo Roe is their twenty-one month old son who was born out of wedlock. Plaintiffs live together as an independent family unit. In late November, 1978, Maria became pregnant by Raoul and in April, 1979, they moved into an apartment together. Maria requested consent from her mother, a widow, to marry Raoul, but Mrs. Moe refused, allegedly because she wishes to continue receiving welfare benefits for Maria. Maria and Raoul continue to be prevented from marrying because of Mrs. Moe's failure to give consent to the marriage as required by section 15. Maria and Raoul allege that they wish to marry in order to cement their family unit and to remove the stigma of illegitimacy from their son, Ricardo.

On July 10, 1980, this court dismissed the complaint on grounds of abstention. The Court of Appeals for the Second Circuit reversed the order of dismissal on December 9, 1980, and remanded the case for further proceedings consistent with its opinion. Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980). On March 27, 1981, this court heard defendants' motions to dismiss

the complaint on the grounds that the claims are not ripe for adjudication and that the complaint is not justiciable as to defendant Axelrod, New York State Commissioner of Health. The court also heard plaintiffs' motion for an order certifying a plaintiff and a defendant class. The court denied defendants' motions to dismiss the complaint and granted plaintiffs' motion for class certification. The court now modifies its order to deny plaintiffs' motion for certification of the second plaintiff subclass consisting of persons born or about to be born to parents who cannot marry because they lack the necessary parental consent pursuant to section 15 to obtain a marriage license. The reasons for the court's decisions are discussed below.

At the close of oral argument on March 27, 1981, the court directed the parties to submit memoranda of law regarding whether notice to the class members is required or appropriate in this action. Upon consideration of these memoranda, the court has determined that notice is not required or appropriate. The reasons for this decision are also discussed below.

Ripeness

Defendants argue that plaintiffs' action should be dismissed on the ground that plaintiffs' claims are not ripe for constitutional adjudication because plaintiffs have not alleged that they applied for and were denied a marriage license. Defendants rely for this contention on cases in which federal courts found complaints not to be ripe because there was no

certainty that the application in question would be denied if presented. See Mendez v. Heller, 530 F.2d 457 (2d Cir. 1976); Rhodes v. Laurino, 601 F.2d 1239 (2d Cir. 1979). Defendants contend that it is essential for plaintiffs in this action to apply for a marriage license because it is possible that the City Clerk will issue a license to plaintiffs.

Defendants' argument must be rejected in light of the Court of Appeals' opinion in Moe v. Dinkins, 635 F.2d 1045 (2d Cir. 1980). In that decision, the court held that the abstention doctrine which authorizes federal courts to refrain from interpreting state law where ambiguities in that law might enable a plaintiff to prevail in the courts of the state did not apply in this case. The court dismissed each of the alternative constructions of section 15 posed by defendants which might permit Maria and Raoul to marry, finding that the statute as written creates a total bar to Maria's marriage so long as her mother demurs. "The crystalline parlance of section 15 has remained unchanged since its enactment over seventy years ago. . . . We hold. . .that the remote and implausible suggestions of ambiguity surrounding the statute before us do not justify abstention." Id. at 1050.

The situation confronting the plaintiffs in this action is similar to that in Image Carrier Corp. v. Beame, 567 F.2d 1197 (2d Cir. 1977), cert. denied, Image Carrier Corp. v. Koch, 440 U.S. 979 (1979). In that case, the Court of Appeals

held that a challenge by nonunion printers of a resolution permitting only union printers to bid for New York City's flat-form printing work was ripe for constitutional adjudication although the nonunion printers did not bid for the work and were not turned down. The court reasoned that after 43 years of implementation of the resolution the City's position was amply developed, and that requiring a nonunion shop to undergo the expense of preparing a bid with the certainty that it would be rejected imposed unnecessary financial hardship, without framing the issues more sharply. Id. at 1202.

As in Image Carrier Corp. v. Beame, supra, it is not necessary in this action to require Maria Moe and Raoul Roe to go through the time, expense and inconvenience of presenting an application for a marriage license which will certainly be denied. The parental consent requirement of section 15 has a long history of implementation and the constitutional questions it poses are already sharply framed. Since the issues in this action are ripe for constitutional adjudication, defendants' motion to dismiss must be denied.

Justiciability as to Defendant Axelrod

Defendant Axelrod, the New York State Commissioner of Health, contends that plaintiffs' claims are not justiciable as to him because there is no direct connection between him and the enforcement of the statute which plaintiffs challenge. Axelrod claims that his supervisory role over local clerks, under New

York Dom. Rel. Law §§ 19-23, extends only to record keeping and not to the issuance of marriage licenses.

A state official may properly be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional statute if that official plays some role in the enforcement of the statute. Donohue v. Board of Elections of the State of New York, 435 F. Supp. 957, 963 (E.D.N.Y. 1976). An examination of Axelrod's duties as New York State Commissioner of Health set forth in the New York Domestic Relations Law reveals that there is sufficient nexus with the enforcement scheme of the Domestic Relations Law to make Axelrod a proper party defendant in this law suit. New York Dom. Rel. Law § 23 provides in pertinent part:

> When [the commissioner] shall deem it necessary, he shall report cases of violation of any of the provisions of this article [Article 3 - Solemnization, Proof and Effect of Marriage] to the district attorney of the county, with a statement of the facts and circumstances; and when any such case is reported to him by the state commissioner of health, the prosecuting attorney shall forthwith initiate and promptly follow up the necessary court proceedings against the person or persons

responsible for the alleged violation of law. Upon request of the state commissioner of health, the attorney-general shall assist in the enforcement of the provisions of this article.

Axelrod's statutory duty to ensure that violators of section 15 are prosecuted is adequate ground for finding that plaintiffs' action challenging the constitutionality of that statute is justiciable as to him. See Donohue v. Board of Elections of the State of New York, supra, 435 F. Supp. at 963; Socialist Workers Party v. Rockefeller, 314 F. Supp. 984, 988 n.7 (S.D.N.Y.) (three-judge court), aff'd, 400 U.S. 806 (1970).

Class Certification

Plaintiffs moved for certification of both a plaintiff class and a defendant class pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The plaintiff class is composed of two subclasses defined as:

1) persons who wish to marry in New York State but cannot obtain a marriage license or judicial approval to obtain a marriage license because they, or the persons whom they seek to marry, lack parental consent as required by [section 15]; and

2) persons born or about to be born to parents who cannot marry because they lack the necessary parental consent pursuant to [section 15] to obtain a marriage license.

The first subclass is represented by Maria Moe and Raoul Roe; the second subclass is represented by Ricardo Roe.

The defendant class is defined as:

all town and city clerks in New York State. All such clerks are required by New York State law to enforce the parental consent provisions of [section 15].

The defendant class is represented by David Dinkins, City Clerk of New York City.

Rule 23(a) provides that an action may be maintained as a class action if the following requirements are satisfied: 1) the class is so numerous that joinder of all members is impracticable; 2) there are questions of law or fact common to the class; 3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and 4) the representative parties will fairly and adequately protect the interests of the class. Plaintiffs seek to maintain this action under Rule 23(b)(2), which requires, in addition to the four prerequisites cited above, that the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding

declaratory relief with respect to the class as a whole. The court finds that the first plaintiff subclass and the defendant class meet all four prerequisites of Rule 23(a) and that this action is maintainable as a class action under Rule 23(b)(2).

There is no practical method for identifying the members of the first plaintiff subclass and no statistics exist which would allow computation of its exact number. However, the fact that the exact number of the class cannot be determined does not bar a finding that the numerosity requirement of Rule 23(a)(1) is satisfied. Siegel v. Realty Equities Corp. of New York, 54 F.R.D. 420, 424 (S.D.N.Y. 1972).

A court may draw reasonable inferences about the size of the class from the facts before it, particularly when injunctive and declaratory relief is sought against a statute or regulation of general application. Wescott v. Califano, 460 F. Supp. 737, 744 (D. Mass 1978), aff'd, 443 U.S. 76 (1979); Doe v. Flowers, 364 F. Supp. 953, 954 (N.D.W.Va. 1973) (per curiam), aff'd mem., 416 U.S. 922 (1974).

In Wescott v. Califano, supra, plaintiffs sought to certify a class of Massachusetts families who were not eligible for Aid to Families with Dependent Children because of alleged sex discrimination in a federal statute and state regulations which granted eligibility to families with unemployed fathers, but not unemployed mothers. The court noted that the Massachusetts Department of Public Welfare did not compile information

concerning the mother's employment history for two parent families denied benefits on the ground that the father did not meet the definition of unemployed and that there was therefore no direct evidence of the size of the class. The court concluded, however, that it could infer from the labor force participation of Massachusetts married women with children, along with recent unemployment statistics, that numerous class members existed. Id. at 744. The court also noted that plaintiffs' inability to identify class members, moreover, buttressed their contention that joinder was impracticable. Id. at 745, citing, Doe v. Charleston Area Medical Center, Inc., 529 F.2d 638, 645 (4th Cir. 1975).

In light of these authorities, the court finds that plaintiffs have demonstrated that their class is so numerous that joinder is impracticable. Defendants do not dispute plaintiffs' representation that in New York City alone there were over 32,000 pregnancies and over 10,000 out-of-wedlock births to women between fifteen and nineteen in 1978 and that in 1979 there were nationwide 26,000 unmarried males and 12,000 unmarried females between the ages of 14 and 19 who were the primary income earners in a household which they shared with one person of the opposite sex.[1/] It is reasonable to infer from these two bodies of statistics that the number of plaintiff class members is sufficiently large to make joinder impracticable.

The basic legal question in this lawsuit is the constitutionality of the parental consent requirement of section 15.

The inability to obtain a marriage license because of the lack of parental consent is the source of the constitutional challenge of all members of the plaintiff class. Thus, there are questions of law and fact which are common to the class, as required by Rule 23(a)(2).

The typicality requirement of Rule 23(a)(3) is satisfied if:

> ...the claims of the representatives and of the members of the putative class arise from the same transaction or legal theory...or if there is an absence of antagonism or conflicting interest between the representatives and absent class members.

Jennings Oil Co., Inc. v. Mobil Oil Corp., 80 F.R.D. 124, 128 (S.D.N.Y. 1978) (citations omitted). This test is met by the representatives and members of both plaintiff subclasses. The claim of the entire class is that the inability to obtain a marriage license because of the absence of parental consent is unconstitutional. The representatives and all class members share the common goal of removing the obstacle of section 15's parental consent requirement and all will benefit if the challenged statute is declared unconstitutional.

Defendants contend that the claims of the representative plaintiffs are not typical because the particular situat: of Maria, Raoul and Ricardo differs from that of other member: the class. Defendants note that in many cases the refusal of

consent is justified as being in the minor's best interests or as representing legitimate state interests. Because the reasons of parents for denying consent vary, defendants argue, individual facts predominate over the common question of law. Defendants also argue that Maria, a sixteen year old, is not suited to represent a class that includes fourteen, fifteen and seventeen year olds, since the maturity level is different at each age.

Defendants' argument demonstrates a misunderstanding the typicality requirement. The representative plaintiffs' claims may be viewed as typical even if they are not identical with the claims of each member of the class. Plaintiffs have satisfied the typicality requirement because their claims are grounded in a common constitutional challenge to a statute of general application. Factual variation among class members d not destroy typicality. Leisner v. New York Telephone Co., 3 F. Supp. 359, 372 (S.D.N.Y. 1973); Mendoza v. Lavine, 72 F.R. 520, 523 (S.D.N.Y. 1976).

Defendant Dinkins' reliance on O'Connell v. Teacher College, 63 F.R.D. 638 (S.D.N.Y. 1973), a suit alleging sex discrimination in the hiring and promotion practices of a co is misplaced. In that case the court declined to certify a composed of female employees and applicants, holding that th issues of fact common to the alleged class members would not predominate over individual issues because a determination o the merits of the claim of each class member would necessita

detailed inquiry into her individual qualifications. Id. at 639 It is clear that the court's reasoning did not pertain to the typicality requirement, but rather to why plaintiffs had not met the requirement of Rule 23(b)(3) that questions of law or fact common to the members of the class predominate over any question affecting only individual class members. Plaintiffs in the instant action seek to maintain the class under Rule 23(b)(2) and not Rule 23(b)(3).

Finally, the court finds that the representative plaintiffs will fairly and adequately protect the interests of the class pursuant to Rule 23(a)(4) since plaintiffs' attorney is a qualified and experienced member of the bar and since the representative plaintiffs' interests are coextensive with those of al class members.

The court finds, however, that it would be inappropriate to certify the second plaintiff subclass. The general outlines of the membership of the class must be determinable at the outset of the litigation. Rappaport v. Katz, 62 F.R.D. 512, 513 (S.D.N.Y. 1974). A class which includes persons "about to be born" is too amorphous and imprecise to meet this standard. Moreover, it is unnecessary to certify this subclass since the court has granted plaintiffs' motion to certify the first plaintiff subclass. The objective of the second plaintiff subclass is to remove the obstacle of the parental veto from their parent marriage so that they will become legitimate children. If the members of the first plaintiff subclass are granted the injuncti

and declaratory relief they seek, the members of the second subclass, their children, will automatically be benefitted. The court, therefore, denies plaintiffs' motion to certify the second plaintiff subclass.

The court also finds that the defendant class satisfies all four prerequisites of Rule 23(a). Defendant class, composed of hundreds of city and town clerks dispersed throughout the state, is clearly of sufficient size to meet the numerosity requirement of Rule 23(a)(1). The question of the constitutional validity of the parental consent requirement of section 15 is common to all members of the defendant class. The shared defense — that the statute is constitutional — satisfies the requirement that the claims of the representative are typical of the class. New York City's clerk, David Dinkins, represented by Corporation Counsel of the City of New York, will afford adequate and fair representation to the class.

In addition, plaintiffs have demonstrated that both plaintiff and defendant classes fall under Rule 23(b)(2) which allows an action to be maintained as a class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole. Where, as here, a statute with statewide application is challenged on the ground of its facial unconstitutionality, allowing the action to proceed on behalf of the class of those whose rights are allegedly infringed against the class of

officials charged with the statute's enforcement serves the interests of judicial administration and justice which Rule 23 was designed to further. Redhail v. Zablocki, 418 F. Supp. 1061, 1066 (E.D. Wis. 1976), aff'd, 434 U.S. 374 (1978). See also Advisory Committee's Note to 1966 Amendment, 39 F.R.D. 102 (1966).

Defendants argue that class certification is unnecessary since declaratory and injunctive relief would bind all clerks in New York State and would assure that all plaintiff class members would be benefitted. Defendants rely principally upon Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974). In Galvan v. Levine, the Court of Appeals affirmed the district court's denial of plaintiffs' motion for class certification pursuant to Rule 23(b)(2) because defendant, the Industrial Commissioner of the State of New York, had made it clear that he understood the judgments to bind him with respect to all claimants. The Court noted that, even before entry of the judgment, the Commissioner had withdrawn the challenged policy even more fully than the court ultimately directed and stated he did not intend to reinstate the policy. Id. at 1261. There was therefore no need to certify the class since the primary objective of plaintiffs in seeking class certification, that of ensuring that the judgment run to the benefit not only of the named plaintiffs but of all others similarly situated, had already been accomplished.

The instant action is distinguishable from Galvan v. Levine. In this case defendants have made no substantial assurances that they will respect an adverse determination and consider themselves bound by it with regard to the general application of section 15. In fact, defendants have steadfastly defended the constitutionality of section 15 and indicated that they would do no more than apply the general concept of stare decisis to the determination of this court. The holding in Galvan v. Levine, therefore, is not a bar to class certification in this action pursuant to Rule 23(b)(2). See Percy v. Brennan, 384 F. Supp. 800, 811 (S.D.N.Y. 1974); Cicero v. Olgiati, 410 F. Supp. 1080, 1099 n.8 (S.D.N.Y. 1976).[2/]

Notification

Plaintiffs and defendant Axelrod agree that prejudgment notice to class members is not required in this action. Notice is required by Rule 23(c)(2) only in class actions certified under Rule 23(b)(3). The Supreme Court stated in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n.14 (1974), that "[b]y its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declarative relief maintained under subdivision (b)(2)." The Court of Appeals for this Circuit has also noted that prejudgment notice is not required in class actions maintained under Rule 23(b)(2). Ives v. W.T. Grant Company, 522 F.2d 749, 764 (2d Cir. 1975); Frost v. Weinberger, 515 F.2d 57, 65 (2d Cir. 1975), cert. denied, Frost v. Mathews, 424 U.S. 958 (1976). It i

clear therefore that this court is not required by Rule 23 to order that the class members be notified of the pendency of this action.

Rule 23(d)(2) provides that the court may, in its discretion, make appropriate orders

> requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of. . .the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;
>
> . . .

Plaintiffs and defendant Axelrod contend that none of the considerations that would warrant the court's exercise of its discretion to direct notice, pursuant to Rule 23(d)(2), is present in this case. Nor do considerations of the due process, they argue, require prejudgment notice. The court agrees.

Due process permits binding absentees to a judgment with respect to common questions of law if they have been adequately represented in the suit. Hansberry v. Lee, 311 U.S. 32 (1940). In the class action context, notice is simply a means of assuring this adequacy and is not required where adequate representation is otherwise guaranteed. Marcera v. Chinlund,

595 F.2d 1231, 1240 n.13 (2d Cir.), cert. granted and vacated and remanded on different grounds, 442 U.S. 915 (1979). Defendant class members are adequately represented by David Dinkins, City Clerk for New York City, since his interest in the subject matter of the suit is identical to the interest of the other class members. These interests are further protected by the chief legal officers of the State and City of New York. Defendant class consists of one homogeneous group and the case presents only one legal issue which is common to all defendant class members, i.e., the constitutionality of section 15. There is therefore no need for other class members to be notified in order that they may intervene in the action. See Redhail v. Zablocki, supra, 418 F. Supp. at 1067-1068.

The same considerations support the conclusion that prejudgment notice to plaintiff class members is not necessary. The representative plaintiffs and the class members share the common goal of abolishing the parental veto from section 15 so that they may fully exercise their constitutional rights. Counsel for the named plaintiffs, an experienced member of the bar, will adequately protect the interests of the entire class. Moreover, where the (b)(2) class includes a large number of persons whose identities and whereabouts are unknown, notification may well be impossible. Redhail v. Zablocki, supra, 418 F. Supp. at 1067.

Accordingly, the court holds that the parties are not required to give prejudgment notice of this action to defendant and plaintiff class members.

Dated: New York, New York
June 29, 1981

Constance Baker Motley
CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. Plaintiffs cite HUMAN RESOURCES ADMINISTRATION, REPORT OF THE HRA AD HOC INTERAGENCY TASK FORCE ON ADOLESCENT PREGNANCY (December 1979) and U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, "Marital Status and Living Arrangements", Series P-20, No. 349 (March 1979), respectively, for these figures.

2. The court in Cicero v. Olgiati, supra, a suit by prisoners in New York State correctional facilities challenging the validity of the New York statute which specified the basis for parole release, granted class certification pursuant to Rule 23(b)(2). The court held that Galvan v. Levine was inapposite since defendant had not made the requisite showing. The court also held that, in any event, "considerations of judicial economy justify class treatment here to avoid the likelihood of mootness before a final resolution of the merits. . . .It would be a waste of judicial resources and litigants' expenses to pursue significant constitutional issues if their ultimate resolution might be aborted solely by a change in status of the named plaintiffs." Id. The same considerations of judicial economy make class treatment appropriate in the instant action since the claims of the named plaintiffs would become moot if Maria turns eighteen before the final resolution of the merits.

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. 384 U.S. at 570–71, 86 S.Ct. at 1708. Our review of the above authorities persuades us that the effect of Capper-Volstead is to prevent the full application of the second element of this test to agricultural cooperatives. Capper-Volstead permits the formation of such cooperatives and places no limitation on their size. As the cooperative grows, so, normally, does its power over the market. Thus, while the formation, growth and operation of a powerful cooperative is obviously a "willful acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," *id.*, it is exactly what Capper-Volstead permits.

We conclude that *Grinnell* does not apply to monopoly power that results from such acts as the formation, growth and combination of agricultural cooperatives, but applies only to the acquisition of such power by other, predatory means. It is not a violation of the Sherman Act for the members of an agricultural cooperative to carry out the legitimate objectives of their association which follow naturally from their attempts to achieve unity of effort and the voluntary elimination of competition among themselves. *Maryland and Virginia Milk Producers Association v. United States*, *supra*, 362 U.S. at 465, 80 S.Ct. at 852. *See Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 635, 95 S.Ct. 1830, 1841, 44 L.Ed.2d 418 (1975).

That part of the district court's order which granted defendants summary judgment on plaintiff's claim of a section 1 Sherman Act violation is affirmed. Because it is not clear whether the district court denied defendants' motion for summary judgment dismissing the section 2 count on the premise that the mere accretion of power from formation of a cooperative is sufficient to violate that section or on the ground that predatory acts had been sufficiently shown, that part of the order is vacated, and the matter is remanded to the district court for reconsideration consistent with the principles set forth in this opinion. We express no opinion concerning the district court's ultimate resolution of this portion of defendants' summary judgment application.[1]

Maria MOE, Raoul Roe, and Ricardo Roe, an infant by his father, Raoul Roe, on behalf of themselves and all others similarly situated, Plaintiffs-Appellants,

v.

David DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and David Axelrod, individually, and as New York State Commissioner of Health, Defendants-Appellees.

No. 454, Docket 80-7676.

United States Court of Appeals, Second Circuit.

Submitted Nov. 25, 1980.

Decided Dec. 9, 1980.

Appeal was taken from an order of the United States District Court for the South-

1. There are those who contend that the economics of farming have changed so drastically in recent years through farm growth and mechanization that the Capper-Volstead Act is no longer needed to equalize bargaining power. *See* Tenkmir, *supra* note 5, at 334; Note, *Trust Busting Down on the Farm: Narrowing the Scope of Antitrust Exemptions for Agricultural Cooperatives*, 61 Va.L.Rev. 341, 381–89 (1975). It is for Congress, not the courts, to determine whether there is sufficient merit in this argument to warrant a redesign of the statute.

ern District of New York, Constance Baker Motley, J., which dismissed complaint challenging constitutionality of a New York statute prohibiting marriage by a woman under age of 18 years without parental permission on grounds of abstention. The Court of Appeals, Irving R. Kaufman, Circuit Judge, held that New York's remote and implausible suggestions of ambiguity in statute forbidding marriage by a woman under age of 18 years without parental permission did not justify district court's abstention from determining constitutionality of that statute, particularly in light of fact that the mother and her intended husband had cohabited out of wedlock for a year and a half and had a child who had lived as an illegitimate child for over a year.

Reversed and remanded.

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1. Federal Courts ⇐43

When asked to void a state law on constitutional grounds, federal court will stay its hand if state statute is susceptible of two or more constructions, and if one of the interpretations will either save the statute or modify the constitutional issue.

2. Federal Courts ⇐47

New York's remote and implausible suggestions of ambiguity in statute forbidding marriage by a woman under age of 18 years without parental permission did not justify district court's abstention from determining constitutionality of that statute, particularly in light of fact that the mother and her intended husband had cohabited out of wedlock for a year and a half and had a child who had lived as an illegitimate child for over a year. N.Y. Domestic Relations Law § 15.

3. Parent and Child ⇐16

New York minors are emancipated by agreement of parent and child, or by unilateral action of the parent; emancipation is not within sole power of the child.

* Of the United States District Court for the Southern District of New York, sitting by designation.

Janet M. Calvo, New York City (Washington Square Legal Services, Inc., of counsel), for plaintiffs-appellants.

Robert Abrams, Atty. Gen. of the State of New York, New York City (Robert J. Schack, Asst. Atty. Gen., George D. Zuckerman, Asst. Sol. Gen., New York City, of counsel), for defendant-appellee Axelrod.

Allen G. Schwartz, Corp. Counsel of the City of New York, New York City (June A. Witterschein, New York City, of counsel), for defendant-appellee Dinkins.

Before KAUFMAN and TIMBERS, Circuit Judges, and PIERCE, District Judge.*

IRVING R. KAUFMAN, Circuit Judge:

Federal adjudication of constitutional challenges to state statutes is an arduous task, for the delicate balance between federal and state power must be crafted with a sensitivity responsive to their respective authorities. The Constitution and Congress equip federal courts with authority to void state laws that transgress federal civil rights, but comity toward state sovereignty counsels the power be sparingly used. Accordingly, the doctrine of abstention authorizes our federal courts to refrain from interpreting state law where ambiguities in that law might enable a plaintiff to prevail in the courts of the state. Abstention, however, creates a lapse in the federal protection of civil rights. Accordingly, we are instructed to utilize the doctrine with strict circumspection. Plaintiffs in this case sue to vindicate what they contend to be at the heart of our constitutional liberties, the right to marry and to raise a family without unreasonable social and legal stigma. Their chances of success under state law alone are attenuated at best. The harm they allege is immediate. Abstention is therefore improper, and we reverse the district court's order dismissing the complaint and remand for further proceedings.

I.

A brief review of the facts is instructive. Raoul Roe[1] was born on March 9, 1962, and Maria Moe was born on March 2, 1963. In late November 1978, Maria became pregnant by Raoul. He was sixteen; she was thirteen. Maria's mother, who is a widow, urged Maria to have an abortion; Maria refused. In April 1979, Maria and Raoul moved into an apartment together, and decided to marry. Raoul's parents gave their permission, but Maria's mother refused. On August 21, 1979, Maria bore a son, Ricardo Roe.

Maria, Raoul, and Ricardo filed suit on March 19, 1980, in the federal district court under 42 U.S.C. § 1983 (1976). Their complaint alleged that the New York statute controlling the marriage of minors, New York Domestic Relations Law § 15, unconstitutionally burdened Maria's and Raoul's right to marry.[2] New York law forbids marriage without a license,[3] and section 15 provides in part:

> If it shall appear ... that the woman is under the age of eighteen years and is not under fourteen years of age then the town or city clerk before he shall issue a license shall require the written consent to the marriage from both parents of the minor ... or such as shall then be living ....[4]

Beyond the denial of Maria's and Raoul's right to marry, plaintiffs alleged, the New York statute deprived Maria of workmen's compensation benefits, Social Security benefits, and intestate succession rights she might enjoy as Raoul's wife.[5] Further, they claimed that section 15 inflicted all of the social and economic disabilities of illegitimacy on Ricardo. Therefore, time was of the essence in the prosecution of their suit.

Defendants moved to dismiss, contending that the federal court should abstain from adjudication. Judge Motley, in a careful opinion, found section 15 "unclear in a number of respects," and dismissed the action.[6] This appeal followed.

II.

[1, 2] The legal standard for federal judicial abstention has been considered on numerous occasions, and the law is clear. When asked to void a state law on constitutional grounds, a federal court will stay its hand if the state statute is susceptible of two or more constructions, and if one of the interpretations will either save the statute

1. By district court order, the plaintiffs have been permitted to proceed under pseudonyms.

2. Plaintiffs alleged that marriage is a "fundamental right," *Zablocki v. Redhail*, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), and that such fundamental rights are not restricted to adults, *see Carey v. Population Services Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (making family planning services available to minors). Therefore, plaintiffs contend, § 15's prohibition of their marriage is unconstitutional. In light of our decision, we express no view on the merits, nor on plaintiffs' motion for class certification.

3. *See* New York Dom.Rel.Law § 13 (McKinney 1977). Named as defendants were David Dinkins, City Clerk of New York, and David Axelrod, New York State Commissioner of Health. They administer the granting of marriage licenses.

4. Females *under* fourteen may not marry. New York Dom.Rel.Law § 15-a (McKinney 1977). Females fourteen or fifteen need both parental and judicial consent to marry. *Id.* at § 15, subd. 3. Since Maria never secured parental consent, § 15's judicial consent provision is not relevant here.

Section 15 also requires parental consent for males under eighteen who wish to marry. Raoul had secured such permission. In any event, he was eighteen when the complaint was filed. The district court dealt only with the parental consent requirement relating to Maria.

5. If Maria were Raoul's wife, she might be eligible for Workmen's Compensation benefits under New York Work.Comp.Law § 15 (McKinney 1965 & Supp.1979–1980), Social Security benefits under 42 U.S.C. § 402 (1976), and intestate succession rights under New York Est., Powers & Trusts Law § 4-1.1 (McKinney 1967).

6. The dismissal was without prejudice so that plaintiffs could pursue their constitutional claims, if necessary, in federal court after completion of state court proceedings. *See generally England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 425, 84 S.Ct. 461, 470, 11 L.Ed.2d 440 (1964).

or modify the constitutional issue. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Pharmaceutical Society, Inc. v. Lefkowitz*, 586 F.2d 953, 956 (2d Cir. 1978); *Winters v. Lavine*, 574 F.2d 46, 69 (2d Cir. 1978); *McRedmond v. Wilson*, 533 F.2d 757, 760 (2d Cir. 1976).[7] Should the federal court abstain and the state tribunal elect the saving construction, dividends of comity redound. But should the state suit produce an interpretation in which constitutional infirmities persist, the plaintiff is forced, usually years later,[8] to return to the federal court.

Crucial to the abstention decision, therefore, is the ambiguity of the state statute. A clearly-worded law leaves even the most constitutionally-sensitive state court little room to maneuver its way to a saving construction. Remand under such circumstances serves no purpose of comity; it wastes the plaintiff's, the defendant's, and the state court's time, and causes unseemly delay in the federal court adjudication.

The statute before us is clear. No ambiguous words or phrases exist; the parties concur on the import and application of "consent," "parents," and every other material term. They also agree that the statute as written creates a total bar to Maria's marriage so long as her mother demurs. To evade the constitutional analysis that seems to us so clearly mandated, the state poses three alternative constructions of section 15 which might permit Maria and Raoul to marry. The suggestions are quite strained, and none of the three is sufficiently tenable to merit abstention.

First, the state argues New York courts might impute a requirement of "reasonableness" into the parents' decision to give or withhold consent. Such a standard is, of course, not in the statute, and New York courts have never departed from a literal interpretation of section 15. In *In re Peters*, 96 Misc.2d 183, 408 N.Y.S.2d 761 (Fam. Ct.1978), a widowed mother refused to consent to the marriage of her seventeen-year-old son, and the son sued to secure approval. The Family Court held itself without subject matter jurisdiction, "even were [consent] shown to be unreasonably withheld or refused . . . ." In *Berger v. Adornato*, 76 Misc.2d 122, 350 N.Y.S.2d 520 (Sup.Ct.1973), an under-age male whose parents would not consent challenged the constitutionality of an earlier version of the statute's creation

7. Abstention was initially characterized as an equitable concept, since it is invoked in actions seeking an injunction against the enforcement of a state statute or a declaration that a statute is void. *See Railroad Commission v. Pullman Co.*, 312 U.S. 496, 500, 61 S.Ct. 643, 645, 85 L.Ed. 971 (1941). Although abstention's origins in equity might suggest that decisions to abstain are reversible only if an abuse of discretion, appellate courts from *Pullman* to the present have used a more searching standard of review, and have reversed abstention orders whenever convinced the decision was improper or wrong. 1A *Moore's Federal Practice* ¶ 0.203[1] at 2105–06 (2d ed. 1980). ("[E]lements of the *Pullman* abstention doctrine [are applied] in essentially the same way as a statute is applied"). *See, e. g., Naylor v. Case and McGrath, Inc.*, 585 F.2d 557 (2d Cir. 1978); *McRedmond v. Wilson*, 533 F.2d 757 (2d Cir. 1976); *Freda v. Lavine*, 494 F.2d 107 (2d Cir. 1974). More vigorous review is required because the sensitive federalism concerns served by abstention merit careful appellate scrutiny. Moreover, the factors on which the decision to abstain depends—ambiguity of state law, materiality of the state issue, *see McRedmond v. Wilson*, *supra*—do not fall within any special expertise of a district court. Finally, while abstention first appeared in cases involving injunctions, abstention *sui generis* is not equitable. Since *Pullman*, abstention has been sanctioned in cases wholly at law. *E. g., Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28, 79 S.Ct. 1070, 1072, 3 L.Ed.2d 1058 (1959). We consider our review to approach that of a plenary examination given to questions of law.

8. The abstention doctrine is one of the dark chapters in the history of judicial dispatch. *See, e. g., England v. Louisiana State Board of Medical Examiners*, 384 U.S. 885, 86 S.Ct. 1824, 16 L.Ed.2d 996 (1966) (per curiam) (three suits, nine years); *Silverman v. Browning*, 434 F.Supp. 80 (D.Conn.) (three-judge district court), *aff'd*, 429 U.S. 876, 97 S.Ct. 226, 50 L.Ed.2d 162 (1976) (five years). *See also* Clark, *Federal Procedural Reform and Sisters' Rights to a More Perfect Union*, 40 Tex.L.Rev. 311, 321 (1961) (citing eight- and ten-year delays). *See generally England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 425, 84 S.Ct. 461, 470, 11 L.Ed.2d 440 (1964) (Douglas, J., concurring) ("*Pullman* from the start seemed to have some qualities of a legal research lunacy.").

of different age limits for males and females. The court did not embrace the opportunity to impute "reasonableness" into the parental consent requirement and allow the plaintiff to marry on that ground; instead, it declared the age differential totally unconstitutional. Moreover, where one parent is insane, and therefore presumably unable to give reasoned consent, the permission of that parent is still required. 1964 Op.Atty.Gen. 138. And, the consent of a court-appointed guardian cannot bypass the statutory requirement of parental consent, regardless of the unfairness created by a refusal to grant permission. 1973 Op. Atty.Gen. 144–45.

Second, the state argues that New York courts could read into section 15 a "best interests of the child" standard. This technique, however, has been employed less frequently than the state maintains, and then only in child custody cases. *See, e. g., In re Wesley L. III*, 72 A.D.2d 137, 423 N.Y.S.2d 482 (1st Dep't 1980). In those instances, the governing statute, New York Social Services Law § 384–b, subd. 1 (McKinney Supp. 1979–1980), contains an explicit direction that "the best interests ... of the child" shall be considered. New York courts have curtailed the application of this standard even in the child custody context. *See In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979). Moreover, they have never imputed this language into a statute where the language was not included by the legislature that passed it.

[3] Finally, the state suggests New York courts might read section 15 to exempt "emancipated minors" from the parental consent requirement. Here too, courts have shown no tendency to stray from the words of the statute toward such an interpretation. In *Berger v. Adornato*, *supra*, 350 N.Y.S.2d at 523, the court found the plaintiff to "a mature, emancipated man," but did not find that this status afforded an exemption from the clear words of section 15. Moreover, we note that even if an "emancipated minor" exemption could be read into section 15, it would probably not apply to Maria, for she is not emancipated. New York minors are emancipated by agreement of parent and child, or by unilateral action of the parent. Emancipation is not within the sole power of the child. *Sevrie v. Sevrie*, 90 Misc.2d 321, 394 N.Y.S.2d 389 (Fam.Ct.1977); *Bates v. Bates*, 62 Misc.2d 498, 310 N.Y.S.2d 26 (Fam.Ct.1970). Further, emancipation is generally applied to those over eighteen, see New York Gen.Oblig.Law § 3–101 (McKinney 1977) (declaring contracts of persons over eighteen effective); New York Pub. Health Law § 2504 (McKinney 1977) (allowing persons over eighteen to consent to medical treatment), or over sixteen, see *People ex rel. C. v. Spence-Chapin Services*, 48 U.S.L.W. 2709 (Sup.Ct.N.Y.Co. March 27, 1980) (sixteen-year-old may give up her child for adoption, since no statute disables minors from doing so). Where minors have been treated as adults, see, e. g., New York Penal Law § 30.00 (McKinney Supp. 1979–1980) (youthful offender statute); New York Pub. Health Law § 2305(2) (McKinney 1977) (allowing treatment for venereal disease regardless of age), that practice has been afforded by statute and not by judicial fiat. Moreover, specific problems of public health and safety seem to be the domain covered.

While a proper solicitude for state sovereignty might lead us to abstain where a plausible claim of saving construction is made, we will not elevate resourceful conjurations to probable interpretations in the name of pyrrhic comity. If that were the law, few cases would withstand an abstention attack. In *Napristek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976) (per curiam), we refused to refrain from constitutional examination of a New York statute because we found the suggested alternative construction "would require the state courts to supply a missing term in the ordinance." In *Pharmaceutical Society*, *supra*, 586 F.2d at 957, we declined to forbear, and stated, "Abstention could hardly be justified on the theory that the state court might invent an interpretation at odds with the statute's clear language." *Accord, Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971); *Zwickler v. Koo-*

ta, 389 U.S. 241, 245–52, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967); *Quinn v. Aetna Life & Cas. Co.*, 616 F.2d 38, 41 (2d Cir. 1980) (per curiam). The crystalline parlance of section 15 has remained unchanged since its enactment over seventy years ago.[9]

The propriety of our rule is confirmed by the Supreme Court's decisions in *Bellotti v. Baird*, 428 U.S. 132, 96 S.Ct. 2857, 49 L.Ed.2d 844 (1976), and *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), decided the same day. In both cases, a state statute required parental consent whenever a female under eighteen desired an abortion. If the parents refused, the statute in *Bellotti* allowed a court to override that refusal "for good cause shown;" the statute in *Danforth* was silent. The Supreme Court held abstention proper in *Bellotti*, since state courts might well cure the constitutional objections through construction of the ambiguous "good cause" term in the statute.[10] The statute in *Danforth* was strikingly similar to section 15: short, clear and unambiguous.[11] The Supreme Court found abstention improper.

Finally, we cannot ignore the urgent equities of plaintiffs' complaint. Aside from our usual reluctance to relegate civil rights plaintiffs to the state courts, *see Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967), this case presents a pressure of time which counsels strongly against the use of abstention. Ricardo has lived as an illegitimate child for over a year; his parents have cohabited out of wedlock for a year-and-a-half. If Maria and Raoul have a constitutional right to marry, its exercise should not be postponed. Such facts "[do] not permit us the luxury of a *Pullman* abstention . . . ." *Billington v. Hayduk*, 565 F.2d 824, 825 (2d Cir. 1977) (per curiam). *Accord, Harman v. Forssenius*, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965); *Gangemi v. Sclafani*, 506 F.2d 570, 572 (2d Cir. 1974).

III.

Our decision today does not imply that a colorable claim of saving construction should be ignored. Nor does it require a federal court to reach the constitutional merits of a slightly vague state statute every time a violation of civil rights is alleged. We hold here only that the remote and implausible suggestions of ambiguity surrounding the statute before us do not justify abstention. In drawing the boundary of federalism as we do, we acknowledge the difficulty of our craft in this area of the law.

The order of dismissal is reversed. Since the issue of the constitutionality of section 15 has not been decided below or briefed or argued here, we do not reach it. *See, e. g., McRedmond v. Wilson*, *supra*, 533 F.2d at 764; *Pierce v. La Vallee*, 293 F.2d 233, 236 (2d Cir. 1961). The case is remanded for proceedings consistent with this opinion.

9. For persons under the age of majority, the parental consent requirement has remained intact since the first decade of this century. *See* New York Dom.Rel.Law § 15 (Birdseye, Cumming & Gilbert 1909). New York in 1974 lowered the age of majority from twenty-one years to eighteen, and § 15 was amended accordingly. *See* 1974 N.Y.Laws, ch. 820, § 4. The parental consent provision was not altered.

10. The Supreme Judicial Court of Massachusetts answered the state law questions. *Baird v. Attorney General*, 371 Mass. 741, 360 N.E.2d 288 (1977). The federal district court found the statute unconstitutional as construed, and the Supreme Court affirmed. *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

11. The statute in *Danforth* provided in part:
Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
* * * * * *
(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.
Danforth, *supra*, 428 U.S. at 85, 96 S.Ct. at 2847.

APR 12 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 81 6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

- against -

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

MOTION FOR LEAVE
TO PROCEED IN FORMA PAUPERIS

The petitioners ask leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Leave to proceed in forma pauperis was sought and granted to the named plaintiff in the District Court below. Petitioners were intervenors in that proceeding, and submitted affidavits regarding their income to the district court.

The petitioner's affidavit in support of this motion is attached.

FRANK A. BRESS
Executive Director
Washington Square Legal
Services, Inc.
JANET M. CALVO, Of Counsel
80 Fifth Avenue, Suite 1501
New York, New York 10011
(212) 924-3200

Attorney for Petitioners

RECEIVED

UNITED STATES SUPREME COURT
UNITED STATES OF AMERICA

CRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Petitioners,

- against -

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York State, and DAVID AXELROD, individually and as New York State Commissioner of Health,

Respondents.

AFFIDAVIT

No.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Angel Otero, being first duly sworn, depose and say that I and Vangie Jiminez are the Petitioners in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of our poverty we are unable to pay the costs of said proceeding or to give security therefore.

I further swear that the following statements relating to our ability to pay the cost of prosecuting the appeal are true.

1. I am presently employed at Tree Communications, 250 Park Avenue South, New York, New York. My wages are $560 per month.

2. I bear full responsibility for the complete support of my fiancee, Vangie Jiminez, and our son, Daniel Otero, who live together with me.

3. We have no checking or savings accounts.

4. We own no real estate, stocks, bonds, notes, automobiles or other valuable property.

5. We were intervenors in the case below and did not need to proceed in forma pauperis. However, I did submit affidavits regarding our income to the district court.

6. We were allowed to proceed pseudonymously below, pursuant to an Order issued in accordance with the Memorandum Opinion of Judge Constance Baker Motley, August 17, 1981, in the Southern District of New York. All true name documents were sealed.

7. I request to proceed pseudonymously here, and that this affidavit bearing our true names be sealed.

Angel M. Otero
ANGEL OTERO

Subscribed and sworn to before
me this 8th day of April, 1982.

Janet M. Calvo
Notary Public

JANET M. CALVO
Notary Public, State of New York
No. 31-4524110
Qualified in New York County
Commission Expires March 30, 1983

JANET M. CALVO
Notary Public, State of New York
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Commission Expires March 30, 1983

JANET M. CALVO
Notary Public, State of New York
No. 31-4524110
Qualified in New York County
Commission Expires March 30, 1984

Let the applicant proceed without payment or costs or fees or the necessity of giving security therefore.

Circuit Justice

No. 81-6511

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

CHRISTINA COE and PEDRO DOE, on behalf of themselves and all other persons similarly situated,

Cross-Respondents

v.

DAVID DINKINS, individually and as City Clerk of New York City, on behalf of himself and all town and city clerks in New York States,

Defendants

and

DAVID AXELROD, individually and as New York State Commissioner of Health,

Cross-Petitioner.

AFFIDAVIT OF SERVICE

JANET CALVO hereby duly sworn deposes and says:

1. I am of counsel to Frank Bress, attorney for petitioners, cross-respondents in this case. My office is at 80 Fifth Avenue, Room 1501, New York, New York 10011.

2. On May 28, 1982, I served copies of Cross-Respondents' Brief in Opposition to Cross-Petition for a Writ of Certiorari by depositing the same in a United States Post Office mailbox with first class postage prepaid, addressed to:

a. Honorable Robert Abrams, Attorney General of the State of New York, Two World Trade Center, New York, New York 10047, Robert J. Schack of Counsel, attorney for David Axelrod and

b. F. Schwartz, Corporation Counsel of the City of New York, 100 Church Street, New York 10007, attorney for David Dinkins.

JANET CALVO

Sworn to before me this
28th day of May, 1982

Notary Public

PAULA GALOWITZ
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-4656934
Qualified in New York County
Commission Expires March 30, 1983